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Subject: Implementing The National Environmental Policy Act And Executive Order 12114

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APPENDIX H. Federal Statutes, Regulations, and Executive Orders Related to the NEPA Review Process

H.1 Introduction

a. Establishing contact with, and soliciting the advice of environmental resource agencies at Federal, State, and local levels is one step in planning and initiating the process of a NEPA review. This appendix identifies specific Federal statutes, regulations and Executive Orders that may apply to alternatives being evaluated for NEPA compliance. These laws or regulations require that proposed agency actions which could affect an environmental standard be coordinated with the responsible organization or agency (State or Federal). The responsible agencies' views on avoidance or mitigation of the effects should be considered by the agency proposing the action.

b. The intent of the summarized Federal statutes, regulations and Executive Orders described below is to help in rapid understanding of the important points of each regulation or statute. This summary does not eliminate the need to become familiar with the actual content itself. Dependent on the alternatives examined during the NEPA process, state regulations may also need to be identified, reviewed and their applicability determined.

H.2 Water

H.2.1 Clean Water Act (33 U.S.C. §1251 et seq.)

a. Siting and permitting of wastewater discharges to U.S. surface waters are principally regulated by the Federal Water Pollution Control Act or Clean Water Act (CWA). This Act mandates restoration and maintenance of the chemical, physical, and biological integrity of the nation's waters. Siting requirements may have to be considered if the action or alternative would discharge contaminated water to existing surface water bodies. The Federal implementing agency is the U.S. Environmental Protection Agency (U.S. EPA or EPA); each state was intended to have a CWA-authorized agency.

b. The National Pollutant Discharge Elimination System (NPDES) permit program created by the CWA authorizes specific point source discharges and industrial stormwater discharges to waters of the U.S. Section 404 of this Act regulates discharge of fill or dredged material in U.S. waters and wetlands, requiring a permit from the COE.

H.2.2 Safe Drinking Water Act (42 U.S.C. §300f et seq.)

a. The Safe Drinking Water Act (SDWA), enacted in 1974, established minimum national standards for public water supply systems. The SDWA establishes and enforces national drinking water quality standards and protects underground drinking water sources. Drinking water regulations are promulgated in 40 Code of Federal Regulations (CFR) Parts 141 (National Primary Drinking Water and Standards) and 143 (National Secondary Drinking Water Regulations).

b. Consultation is required if the action or alternative involves construction at or near an area of a designated sole,

special or principal drinking water aquifer. Initial consultation occurs with the Regional EPA Office and respective state SDWA-authorized agency and could take 20 to 45 days. Further consultation could occur with the U.S. Geological Survey. The U.S. Geological Survey is responsible for: topographical and geological mapping of all U.S. lands; identification of water and mineral resources of Federal lands; identification of source, quantity, quality distribution, movement, availability of surface- and ground-waters; and hydrologic studies.

H.2.3 Executive Order 11990 (Protection of Wetlands)

Executive Order 11990 establishes wetland protection as the official policy of all federal agencies. The order directs that each agency take action "to minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands." Work conducted or funded by a federal agency should not call for new construction in wetlands unless there is no practicable alternative and the proposed action includes all practicable measures to minimize damage to wetlands. Agencies are required to provide for early public review of any plans for proposals for new construction in wetlands.

H.2.4 Executive Order 11988 (Floodplain Management)

Executive Order 11988 requires that Federal Governmental agencies shall minimize to the extent possible, long- and short-term adverse impacts from occupying and modifying floodplains. This Order requires the proposing agency to determine that there are no practicable location alternatives before construction in a floodplain can occur. The Order emphasizes reducing the risk of flood loss and minimizing the impact of floods on human safety, health, and welfare. Mandatory actions must be taken "to restore and preserve the natural and beneficial values served by floodplains" in conducting Federal activities and programs affecting land use. The Order also provides for public review and comment.

H.2.5 40 CFR 146, Underground Injection Control (UIC) Program

As part of the SDWA, the UIC program, designed to protect underground water sources, provides regulations for the injection of liquids into wells for storage or disposal.

H.2.6 33 CFR Part 320 (Navigation and Navigable Waters, General Regulatory Policies Pursuant to the Clean Water Act)

The CWA protects waterways and wetlands under 33 CFR Part 320. Permit applications for activities affecting waterways and wetlands are reviewed by the COE, the lead agency for enforcement of wetland requirements, in consultation with the U.S. Fish and Wildlife Service, the Natural Resource Conservation Service, the respective state agency for protection of the environment, and the EPA. A permit would need to be obtained from the COE before implementing action that could disturb wetlands.

H.3 Air

H.3.1 Clean Air Act, as amended 1990 (42 U.S.C. 7401 et seq.)

H.3.1.1 Protecting clean air from significant deterioration, the Clean Air Act (CAA), amended in 1990, established the National Ambient Air Quality Standards (NAAQS). These regulations are promulgated in 40 CFR Part 50 (Protection of Environment, National Primary and Secondary Ambient Air Quality Standards). Primary standards specify a level of air quality necessary to protect the public health. Secondary standards specify air quality necessary to protect the public welfare from known or anticipated adverse effects, including effects on economic values, and personal comfort (e.g., protect against damage to soils, crops, wildlife, weather, climate, and personal comfort).

H.3.1.2 NAAQS, implemented by EPA and authorized state agencies, set limits on ambient air concentrations of criteria pollutants: sulfur dioxide, nitrogen dioxide, respirable particulate matter, carbon monoxide, lead, and ozone.

H.3.1.3 Attainment of NAAQS is accomplished through emission limitations. If actual air pollutant concentrations exceed NAAQS, the level of pollution control on emissions sources is to be made more stringent in an effort to bring ambient concentrations to appropriate levels. Areas that are not in compliance with NAAQS are referred to as nonattainment areas. An area may be considered in nonattainment for one or more of the criteria pollutants and as being in attainment for other. Controls to bring these areas into attainment are implemented through State Implementation Plans. The CAA establishes and enforces national air quality standards, and requires Federal action to conform to any state air quality implementation plan approved or promulgated under Section 100 of the Act.

H.3.1.4 The CAA amendments of 1990 include a production phase-out of Class I Ozone Depleting Chemicals, including Chlorofluorocarbons (CFC), halons, carbon tetrachloride and 1,1,1-trichloromethane by December 31, 1995, unless a limited specific waiver is obtained, and hydrochlorofluorocarbons (HCFCs) by schedule of dates ending entirely in 2030. These amendments provide a policy for replacing ozone-depleting chemicals with substitute products or alternative manufacturing processes that reduce overall risks to human health and the environment. Executive Order 12843 (Procurement Requirements and Policies for Federal Agencies for Ozone-Depleting Substances; April 1993) direct federal agencies to the extent possible to comply with CAA requirements regarding

stratospheric ozone protection and maximize safe alternatives usage presently and in the future.

H.3.1.5 EPA has set National Emission Standards for Hazardous Air Pollutants (NESHAP) for inorganic arsenic, asbestos, benzene, beryllium, mercury, radionuclides, radon, vinyl chloride, and fugitive emissions. The regulations for NESHAP's are found in 40 CFR Part 61. (National Emission Standards for Hazardous Air Pollutants); enforcement authority currently rests with EPA. NESHAP's apply to both existing and new stationary sources.

H.3.1.6 The CAA amendments of 1990 designate 189 substances of Hazardous Air Pollutants (HAP). EPA must periodically revise the HAP list and can add pollutants that present or may present a threat of adverse human health or environmental effects.

H.4 Flora and Fauna

H.4.1 Endangered Species Act of 1973, as amended (16 U.S.C. 1531-1544)

H.4.1.1 The Endangered Species Act of 1973 protects proposed and listed threatened and endangered species and critical habitats. The Act requires federal agencies to formally consult with the U.S. Department of Interior, U.S. Fish and Wildlife Service, Department of Commerce, and National Marine Fisheries Service to ensure that actions do not jeopardize listed threatened or endangered terrestrial species or marine species or result in the destruction or adverse modification of designated critical habitat. Rules for consultation by federal agencies are promulgated in 50 CFR Part 402 (Consultation by Federal Agencies). The U.S. Fish and Wildlife maintains current lists of species that have been designated as threatened or endangered.

H.4.1.2 The Act includes flora as well as fauna, prohibits the harm, harassment, trade, or capture of endangered species, and provides for the protection of threatened species. If no previous NEPA documentation exists for the area involved in the alternative, a biological survey and evaluation may be required to determine the potential of the presence of any species listed as endangered or threatened. Initial consultation can take from 30 to 45 days. However, field surveys if required could extend in excess of 1 year to identify seasonal issues.

H.4.1.3 Section 7 of this Act required Federal agencies to ensure that all federally associated activities within the U.S. do not jeopardize the continued existence of threatened or endangered species on designated areas (critical habitats) that are important in conserving those species. The USFWS has established informal and formal consultation procedures and the results of such communications under Section 7 of the Act should be described and documented in the EA/EIS/ERD, as appropriate. If a threatened or endangered species may be affected by the action, a detailed endangered species assessment (Biological Assessment) may be prepared independently or concurrently with the EIS and included as an appendix to the EA/EIS/ERD.

H.4.2 Fish and Wildlife Coordination Act of 1965 (16 U.S.C. 661-666c)

The Fish and Wildlife Coordination Act of 1965 ensures that fish and wildlife resources receive equal consideration with other resources during project planning involving water resources larger than 4 ha (10 acres). Consultations are required when a Federal agency plans to conduct an activity involving the impoundment, diversion, deepening, control or modification of a body of water. The Act requires federal agencies to consult with the U.S. Fish and Wildlife Service and appropriate state wildlife agencies to assess impacts on wildlife resources and to modify project plans by justifiable means and measures to prevent loss or damage to those resources.

H.4.3 Migratory Bird Treaty Act of 1972 (16 U.S.C. 703-711)

The Migratory Bird Treaty Act of 1972 protects many birds, even some that may not individually migrate, by limiting transportation, importation, killing or possession of these birds.

H.4.4 Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 et seq.)

This Act prohibits taking or harassment of any marine mammals except incidental take during commercial fishing, capture under scientific research and public display permits, harvest by Native Americans for subsistence purposes, and any other take authorized on a case basis as set forth in the Act.

H.5 Land Use

H.5.1 Wild and Scenic Rivers Act of 1965 (16 U.S.C. 1271 et seq.), Wilderness Act (16 U.S.C. 1131 et seq.)

The Wild and Scenic Rivers Act of 1965 protects designated rivers and areas from development or effects of construction. The requirements of these acts would have to be considered if construction would impact any designated wilderness area or protected river. Initial consultation would occur with the U.S. Forest Service or Department of the Interior depending on the jurisdiction and could take 30 to 45 days. Related guidance on Wild and Scenic Rivers can be found in CEQ Memoranda at 45 FR 59189. Procedures for the management of lands administered under provisions of this Act can be found at 43 CFR 8351.

H.5.2 Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.)

The Act authorizes the National Oceanic and Atmospheric Administration (NOAA) to make grants to States to develop coastal zone management programs. Any Federal action which directly affects a coastal zone must be consistent, to the maximum extent practical, with the approved State coastal zone management program. Initial consultation would occur with the respective State coastal zone management agency and could take 45 to 60 days. Related guidance can be found in 15 CFR 930 [National Oceanic and Atmospheric Administration (NOAA) Regulations on Federal Consistency with Approved Coastal Management Programs].

H.5.3 Rivers and Harbors Act of 1899 (33 U.S.C. 403 et seq.)

This Act regulates all types of development in or over navigable waters, including bridges, dams, dikes, piers, wharves, booms, jetties, dredging, and filling by requiring COE permits for such actions. Court decisions have expanded protection to estuaries and wetlands.

H.5.4 Farmland Protection Policy Act (7 U.S.C. 4201 et seq.)

The Farmland Protection Policy Act requires Federal agencies to "minimize the extent to which programs contribute to the unnecessary and irreversible conversion of farmland to nonagricultural uses," and to assure that Federal programs are administered in a manner that, to the extent practicable, will be compatible with State, local government, and private programs and policies to protect farmland. Related guidance can be found in CEQ Memoranda on Prime and Unique Farmlands, 45 FR 59189.

H.6 Cultural Resources

H.6.1 National Historic Preservation Act of 1966 (16 U.S.C. 470 et seq.)

The National Historic Preservation Act (NHPA) establishes the National Register of Historic Places (National Register) and requires Federal agencies to consider the effects of their actions on cultural resources that are listed or are eligible for listing in the National Register. To evaluate possible effects of the proposed actions, Section 106 of National Historic Preservation Act requires an agency to identify and evaluate historic properties, assess the effects of the project on the properties, consult with the State Historic Preservation Office (SHPO), and solicit comments from the Advisory Council on Historic Preservation in certain instances. This Act protects those sites in the project area that are listed in or eligible for listing in the National Register. Such listings can include districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, and culture. The SHPO is responsible for providing information on those sites where projects may have an impact. Recent amendments to NHPA emphasize the need to solicit concerns from Native Americans to protect traditional religions and culturally important properties. Regulations pursuant to the National Historic Preservation Act include 36 CFR Part 78 (Waiver of Federal Responsibilities Under Section 110 of the National Historic Preservation Act), and 36 CFR Part 800 (Protection of Historic and Cultural Properties).

H.6.2 Executive Order 11593 (Protection and Enhancement of the Cultural Environment)

This Executive Order directs all federal land-holding agencies to identify cultural resources, nominate qualifying resources to the National Register, and avoid damaging resources that might be eligible for the National Register. Executive Order 11593 mandated that federal agencies strictly comply with requirements of the National Historic Preservation Act of 1966.

H.6.3 Archaeological and Historic Preservation Act (16 U.S.C. 469 et seq.)

This Act deals with the preservation of data with respect to the historic properties.

H.6.4 Archeological Resources Protection Act of 1979 (16 U.S.C. 470aa-470mm)

The Act ensures that protection and preservation of archeological sites on Federal land. It requires that federal permits be obtained before cultural resource investigations begin at sites on federal land.

H.6.5 American Indian Religious Freedom Act (42 U.S.C. 1996)

This Act states that it is the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise traditional religions. These rights include, but are not limited to, access to traditional sites, use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rites.

H.6.6 Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 et seq.)

This Act requires Federal land owners to identify the tribal association of any Native American artifacts or human remains and provide repatriation opportunity.

H.6.7 36 CFR 60 (National Register of Historic Places)

A set of criteria for evaluating the significance of resources and their eligibility to the National Register can be found at 36 CFR 60.4.

H.6.8 36 CFR 800 (Protection of Historic Properties)

An explicit set of procedures for Federal agencies to meet their obligations and the National Historic Preservation Act and Executive Order 11593 can be found at 36 CFR 800. The regulations define the requirements of the Section 106 process and establish procedures for determining the eligibility of a resource and defining possible effects and adverse effects.

H.7 Other

H.7.1 Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Population)

a. Executive Order 12898, entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Population (FR 1994) directs Federal agencies to incorporate environmental justice as part of their missions. As such, Federal agencies are specifically directed to identify and address as appropriate disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations. Executive Order 12898 requires all Federal agencies to encourage environmental fairness by developing individual agency strategies to prevent disproportionate consequences.

b. Analysis of environmental justice concerns would start with a qualitative assessment of whether there are any technical areas analyzed in the agency action that are more prone to potential environmental inequities if a proposed action is implemented. NOTE: In March 1995, NASA authored its Environmental Justice Strategy. This document established NASA's policy and goals regarding integrating environmental justice issues and concerns into all of its programs, policies, and activities. Each NASA Center or Component Facility is responsible for developing its own Environmental Justice Implementation Plan.

H.7.2 Executive Order 12088 (Federal Compliance with Pollution Control Standards)

Executive Order 12088 requires agency leadership to ensure all necessary actions are taken, as amended by EO 12580 CERCLA Implementation for the prevention, control, and abatement of environmental pollution, including noise pollution, with respect to Federal facilities and activities under the control of the agency.

H.7.3 Emergency Planning and Community Right-To-Know Act (EPCRA) (42 U.S.C. 11001 et seq.)

EPCRA requires that facilities managing toxic chemicals exceeding the threshold planning quantity report annually on toxic chemical inventories and releases and offsite transfers and prepare and provide upon request an emergency response plan.

H.7.4 Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.)

This act is a comprehensive statute designed to expand oil and gas spill prevention activities, establish new Federal authority to direct responses to oil spills, and improve spill preparedness, and response capabilities.

H.7.5 Resource Conservation and Recovery Act (RCRA) (42 U.S.C. 6901 et seq.)

RCRA, implemented by EPA, provides cradle to grave regulation of hazardous waste as defined and listed in 40 CFR 261 (Identification and Listing). Regulations apply to those who generate, transport, treat, store, or dispose of hazardous waste. RCRA regulates underground tank projects. In particular, the Act establishes site selection criteria for hazardous waste disposal facilities.

H.7.6 Hazardous Materials Transportation Act (49 U.S.C. 1803 et seq.)

The Hazardous Materials Transportation Act established criteria for shippers and carriers that manage hazardous materials and include training and qualifications of persons handling hazardous materials. This Act requires the responsible party to package, label, mark and/or placard hazardous waste when transporting offsite.

H.7.7 Toxic Substances Control Act of 1976 (15 U.S.C. 2601 et seq.)

The Toxic Substances Control Act provides for the control of the manufacture, processing, use, distribution, and disposal of chemical substances which may present a risk to health or the environment. The Act principally regulates Polychlorinated Biphenyls (PCB), radon, lead-based paint in housing, and asbestos-containing materials in schools.

H.7.8 Solid Waste Disposal Act and Amendments of 1980 (42 U.S.C. 6901 et seq.)

This Act amends RCRA with additional regulation of energy and materials conservation and establishes a National Advisory Council.

H.7.9 Noise Pollution and Abatement Act (42 U.S.C. 7641)

Under this Act, all Federal agencies are required to comply with Federal, State and local requirements respecting control and abatement of environmental noise to the extent that any public citizen is subject to these requirements. Consultation requirements would be dependent on local/State applicability.

H.7.10 Executive Order 13148, Greening the Government Through Leadership in Environmental Management

Executive Order 13148 requires Federal agencies to incorporate environmental management systems into agency day-to-day decisionmaking and long term planning processes. Pollution prevention is highlighted as a key aspect to the environmental management system processes. In addition, this EO incorporates the Presidential Memorandum for the Heads of Executive Departments and Agencies on Environmentally and Economically Beneficial Practices on Federal Landscaped Grounds dated August 22, 1994. It promotes the sustainable management of Federal facility lands through implementing cost-effective, environmentally sound landscaping practices, and programs to reduce adverse impacts to the natural environment.

H.8 Miscellaneous Regulations, Statutes, and Executive Orders

Other potentially relevant regulations, statutes, and Executive Orders are provided below.

- a. Pollution Prevention Act of 1990 (42 U.S.C. 13101 et seq.)
- b. Coastal Barrier Resources Act (16 U.S.C. 3501 et seq.)
- c. National Energy Management Improvement Act of 1988 (P.L. 100-615)
- d. National Energy Conservation Policy Act (42 U.S.C. 8251 et seq.)
- e. Energy Policy Act of 1992 (Pub.L. 102-486)
- f. Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601 et seq.)
- g. Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. 136 et seq.)
- h. Bald Eagle Protection Act (16 U.S.C. 668-668a)
- i. Abandoned Shipwreck Act (43 U.S.C. 2101 et seq.)
- j. Executive Order 11514 (amended by Executive Order 11991): Protection and Enhancement of Environmental Quality
- k. Executive Order 12759: Federal Energy Management
- l. Executive Order 12843: Procurement Requirements and Policies for Federal Agencies for Ozone-Depleting Substances
- m. Executive Order 12844: Federal Use of Alternative Fueled Vehicles
- n. Executive Order 12845: Requiring Federal Agencies to Purchase Energy Efficient Computers
- o. Executive Order 12873: Federal Acquisition, Recycling, and Waste Prevention
- p. Executive Order 12902: Energy Efficiency and Water Conservation at Federal Facilities
- q. OMB Circular A-11: Preparation and Submission of Budget Estimates
- r. OMB Circular A-106: Reporting Requirements in Connection with the Prevention, Control, and Abatement of Environmental Pollution at Existing Federal Facilities

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